Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

NO. 78-940

JOHN F. GREEN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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JOHN F. GREEN,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above-named Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 15, 1978.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the PETITIONER'S APPENDIX

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on September 15, 1978. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on November 13, 1978, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1954(1).

Question Presented

Whether the trial court erred in denying Petitioner's motion for mistrial when a Drug Enforcement Administration agent in an unresponsive answer volunteered information before the jury about Petitioner's "prior narcotics charge"?

Statement of the Case

On February 10, 1977, a grand jury sitting at Hartford, Connecticut, returned a true bill of indictment charging Defendant John F. Green in two counts with violations of Sections 841(a)(1) and 846 of Title 21, United States Code.

Count One of the Indictment charged Green with knowingly and intentionally distributing approximately 26 grams of cocaine on or about October 8, 1976 in the District of Connecticut, in violation of Title 12, United States Code, Section 841(a)(1).

Count Two of the Indictment charged Green and unindicted co-conspirator Ronald J. Myers with conspiracy in the District of Connecticut and elsewhere from on or about October 8, 1976 to on or about October 15, 1976, to distribute a quantity of cocaine in violation of Title 21, United States Code, Section 846. It was alleged as part of said conspiracy that Green and Myers would meet in

Hartford, Connecticut, on October 8, 1976; that Myers would meet "Bill Sutherland" at Valles Steak House in Hartford on October 12, 1976; and that Green and Myers would meet in Littleton, Massachusetts on October 12, 1976.

Said Indictment was ordered sealed and the Court issued a bench warrant for Green's arrest.

On March 7, 1977, Green was presented on these charges, entered "Not Guilty" pleas on both counts, and was released on a $1,000 non-surety bond.

On May 2, 1977, a jury of twelve and two alternate jurors was selected and sworn for the trial of this matter in United States District Court at Hartford. On June 14, 1977, the trial of Green commenced before the Honorable T. Emmet Clarie, Chief United States District Judge and the aforesaid jury. The Government rested its case at 4:20 p.m. on this same day. The Defendant then testified and the defense rested at the end of the day on June 14, 1977. After arguments by counsel on the following day, June 15, 1977, the jury deliberated and returned at 1:35 p.m. with a verdict of "Guilty" on each count. Bond was set at $5,000 with full surety pending disposition. Green posted said bond on June 15, 1977.

On July 29, 1977, the Court (Clarie, J.) sentenced Green on each count of the Indictment to a term of imprisonment of seven (7) years, a $5,000 committed fine, and three (3) year Special Parole term. Said sentences were to run concurrently. An appeal bond of $25,000 with surety was set by the Court. Appellant Green posted said bond on August 1, 1977.

Several notices of appeal were filed on August 5, and August 9, 1977. New counsel originally appeared for Green on August 9, 1977. Said counsel failed to diligently prosecute said appeal and on or about May 3, 1978, Green's appeal was dismissed by this Court. On or about May 8, 1978, the District Court found Green in default

and ordered the bond of $25,000 payable on May 15, 1978. Green surrendered to U. S. Marshalls in Hartford on May 15, 1978.

Present counsel appeared for Green on May 16, 1978, and filed a Motion to Reinstate the Appeal. Said motion was granted by the Second Circuit Court of Appeals on June 9, 1978, after Green had been in custody for about one month. Green posted a second surety bond in the amount of $25,000.

On September 15, 1978, the Court of Appeals affirmed the judgment of the trial court. Petitioner thereafter filed a Petition for Rehearing and Suggestion for Rehearing *en banc* on September 27, 1978, which petition was denied on November 13, 1978. A motion was then filed to stay the mandate of the Second Circuit Court of Appeals while Petitioner sought a writ of certiorari from the Supreme Court of the United States. Green continues at liberty pursuant to the posted $25,000 appeal bond.

Reason for Granting the Writ

The issue raised herein, that is, whether an experienced Government witness' reference to a prior narcotics arrest of Petitioner had such a prejudicial effect on the jury that it deprived Petitioner of a fair trial, is one of grave constitutional significance. Such a reference undermines the presumption of innocence and goes to the very heart of the Fifth Amendment.

I.

The Court erred in denying Petitioner's motion for a mistrial when a Drug Enforcement Administration Agent in an unresponsive answer volunteered information before the Jury about Defendant's "Prior Narcotic Charge".

The evidence in this case took approximately five and one-half (5½) hours to present. It was all heard by the jury during one day, June 14, 1977. On two occasions during this brief trial, Drug Enforcement Administration ("DEA") agents volunteered information before the jury that was so prejudicial to the Defendant that it effectively deprived him of a fair trial.

On the first occasion, in response to a question by the Assistant United States Attorney, DEA Agent Breard volunteered that:

> "Mr. Myers informed me that his *source of supply had been involved in narcotics transactions for . . .*"

Defense counsel cut in with an objection and the Court in front of the jury remarked:

> "It might be claimed to be prejudicial, Counsellor. The Court will sustain the objection." (App. B, p. 5a.)

No further mention was made of this and no instruction was given or requested on it. However, the Court's remark about "claimed prejudice" and Breard's volunteered answer were before the jury early in the proceedings. It should be noted here that the conspiracy count only dealt with a one-week period in October of 1976 and not any other alleged prior narcotics activity by Defendant Green. Yet, the inference to be drawn from this improper answer is most clear.

Later in the trial, DEA Agent Seymour, an agent with several years' experience, whose principal testimony involved surveillance of unindicted co-conspirator Myers and Defendant Green, gave a similar prejudicial response to a question by defense counsel on cross-examination, which answer clearly was unresponsive to the question and again blatently presented the jury with the fact of prior narcotics activity by the Defendant Green. (App. B, p. 5a).

Defense counsel asked Seymour who it was who identified the man surveilled as John Green. The answer was critically unresponsive in that Seymour disclosed that he had received "a photograph in the mail *from a police officer who had once arrested Mr. Green on a prior narcotics charge . . .*". [Emphasis supplied.] Defense counsel made a timely objection at a bench conference which took place with the jurors still present in the courtroom. The full text of the dialogue is included in PETITIONER'S APPENDIX B.

The Court of Appeals for the Second Circuit found that Agent Seymour's answer was in error.[1] However, the Court of Appeals further found that Judge Clarie's cautionary instruction to the effect that the prior narcotics violation only involved marihuana and was dismissed [2] eliminated any possible prejudice to the Defendant. (App. B, p. 5a.) No mention was made of Agent Breard's earlier prejudicial answer.

[1] Said finding of error was undoubtedly based on the well-settled rule of law that evidence of other crimes, arrest, convictions or criminal conduct unconnected with the crime for which the defendant is on trial is inadmissible. *United States* v. *Harrington*, 440 F.2d 487 (2d Cir. 1973); *United States* v. *Calarco*, 424 F.2d 689 (2d Cir. 1970); *United States* v. *Reed*, 376 F.2d 226 (7th Cir. 1967); *Ralls* v. *Manson*, 375 F. Supp. 1271 (D. Conn. 1974), *reversed on other grounds*, 503 F.2d 491; *State* v. *Costa*, 306 A.2d 36 (R.I. 1973); *Clark* v. *State*, 337 So. 2d 858 (Fla. App. 1976); *Commonwealth* v. *Turner*, 311 A.2d 899 (Pa. 1973); *Commonwealth* v. *Rivers*, 357 A.2d 553 (Pa. Super. 1976); *Tallo* v. *United States*, 344 F.2d 467 (1st Cir. 1965).

[2] *See, Clark* v. *State*, 337 So. 2d 858 (Fla. App. 1976) re: the effect of "narcotics" mentioned to law-abiding members of the community.

The mythology behind the value of a cautionary instruction for curative effect of a prejudicial answer of this nature has been recognized in the Second Circuit and by the Supreme Court of the United States. As Judge Blumenfeld stated in *Ralls* v. *Manson*, *supra*, at 1289:

> ". . . At the petitioner's trial the judge's first cautionary instruction to the jury emphasized that that defendant had a prior record, 'whatever it was' and despite the fact that 'it might have been just a minor matter.' When the defendant's counsel then asked that the jury be excused, the issue of the prior record became even more prominent. Finally, the trial judge emphasized the prior record again by giving the jury a second cautionary instruction. It would strain credulity to the breaking point to believe that the judge's weak and belated disclaimer, 'I don't know what the extent it covers, whether it might have been an application for employment,' had any real effect on the jury's perceptions. *'The naive assumption that prejudicial effects can be overlooked by instructions to the jury . . ., all practicing lawyers know to be unmitigated fiction.'*" [Emphasis supplied.] *Krulewitch* v. *United States*, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790 (1949) (Jackson, Jr., concurring).

In *Ralls*, both prior mug shots and a fingerprint card had been introduced at trial. Judge Blumenfeld concluded on the effect of the inferences to be drawn from such evidence:

> ". . . Although the issue of petitioner's prior arrest record arose in this case in the context of a ruling

> on evidence, the highly prejudicial character of the circumstances surrounding the ruling remove it from the class of merely harmful errors and demonstrate that it was so prejudicial as to result in the denial of that fair trial which the Constitution guarantees. There can be no question that the right to a fair trial is guaranteed by the Due Process Clause." *Ralls, supra,* at 1291.

When one views the answers of each of the DEA agents, it is clear that the Second Circuit of Appeals' reliance on United States v. Burton, 525 F.2d 17 (2d Cir. 1975) as to the validity of a cautionary instruction is misplaced. In *Burton,* there was no fact before the jury that appellant had been arrested or charged with a prior narcotics violation nor any answer as to the length of time that the appellant had been in the narcotics business. Rather, *Burton* involved no arrests or charges but only a prior investigation of appellant.

In this brief trial wherein the appellant's prior narcotics history was twice volunteered by the DEA agents, and wherein there were no direct acts or statements by the Defendant, and a great deal of the Government's case rested upon the testimony of a convicted accomplice, the trial court could not have had a conviction in which it was "sure that the error did not influence the jury or had but very slight effect." *Kotteakos* v. *United States,* 328 U.S. 750, 764 (1946); *United States* v. *Sandy Check,* 582 F.2d 668 (2d Cir. 1978); *United States* v. *Ruffin,* 575 F.2d 346 (2d Cir. 1978).

The Second Circuit panel's brief two-page memorandum of decision four days after oral argument affirming Petitioner's conviction overlooked or fundamentally misapprehended the prejudicial effect of Agent Seymour's answer, particularly in light of Agent Breard's earlier answer before the jury concerning the length of time

appellant was involved in "narcotics transactions", the impact of such statements in a trial of such short duration and the fact that the Court of Appeals found Seymour's answer to be in error. In the context of this brief trial, despite the cautionary instruction, it is difficult to see how the Second Circuit Court of Appeals, after finding error at least as regards the Seymour answer, could find that such error did not influence the jury or had only a very slight effect.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

PETITIONER

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Dated: December 12, 1978

APPENDICES

APPENDIX A

Memorandum Opinion Below of United States Court of Appeals for the Second Circuit, dated September 15, 1978

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

78-1206

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of September, one thousand nine hundred and seventy-eight.

Present: Hon. James L. Oakes,
Hon. Murray I. Gurfein,
Hon. Thomas J. Meskill,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN F. GREEN,

Appellant.

ORDER

It is hereby ORDERED that the judgment of the United States District Court for the District of Connecticut, T. Emmet Clarie, Judge, be and it hereby is affirmed.

Memorandum Opinion

Appellant makes two points on appeal: one, that transcripts of the taped conversations should not have been permitted in the jury room; the second, that DEA Agent Seymour's reference to a prior "narcotics" arrest of appellant in response to a rather inartful query by defense counsel was prejudicial error entitling appellant to a mistrial. Neither has merit.

Transcripts of tapes, like other real evidence, may assist the jury in understanding other evidence. Accordingly, their use is a matter of trial court discretion. *United States* v. *Carson*, 464 F.2d 424, 437 (2d Cir.), *cert. denied*, 409 U.S. 949 (1972). There is no indication of abuse in its exercise here.

The response of the DEA agent, even if the question to him was poorly phrased, was error. But the trial judge's careful instruction that the arrest "concerned a matter involving marijuana, which case was dismissed, and there was no conviction on it. . . . Eliminate any possible prejudice that might flow from it, that answer against this defendant, because it was a marijuana matter, and it shouldn't even have been mentioned" cured the error and eliminated any prejudice. *E.g.*, *United States* v. *Burton*, 525 F.2d 17 (2d Cir. 1975).

Judgment affirmed.

/s/ JAMES L. OAKES
JAMES L. OAKES

/s/ MURRAY I. GURFEIN
MURRAY I. GURFEIN

/s/ THOMAS J. MESKILL
THOMAS J. MESKILL
Circuit Judges.

APPENDIX A(2)

Ruling on Reconsideration and *En Banc*

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

78-1206

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of November, one thousand nine hundred and seventy-eight.

Present: Hon. James L. Oakes
Hon. Murray I. Gurfein
Hon. Thomas J. Meskill
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN F. GREEN,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the defendant-appellant John F. Green,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

Ruling on Reconsideration and En Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

78-1206

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of November, one thousand nine hundred and seventy-eight.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN F. GREEN,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, John F. Green, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
IRVING R. KAUFMAN,
Chief Judge

APPENDIX B(1)

Transcript pp. 19 and 20 Re: Volunteered Testimony of DEA Agent About Prior Narcotics Transactions

Q. What questions did you ask him and what answers did you receive from Ronald Myers?

A. I asked Mr. Myers questions concerning his source of supply, his source of supply's ability to deliver the quantities of cocaine that we had been discussing. Mr. Myers informed me that his source of supply would have no problem with delivering up to one pound of cocaine per week.

Mr. Myers informed me that his source of supply had been involved in narcotics transactions for—

MR. CHISHOLM: I object to that.

THE COURT: It might be claimed to be prejudicial, Counsellor. The Court will sustain the objection.

APPENDIX B(2)

Transcript pp. 149-153 Re: Volunteered Testimony of DEA Agent About Green's "Prior Narcotics Charge" and Judge Clarie's Cautionary Instruction

Q. When you went on this moving surveillance, and went up to the exit at Sturbridge, and you observed the person that you later identified as John Green, who was it that later identified him as John Green?

A. I received a photograph in the mail from a police officer who had once arrested Mr. Green on a prior narcotics charge, and I compared the photograph to the likeness of the person I saw, and I identified that person as John Green.

MR. CHISHOLM: Your Honor, I have a motion I would like to address to the Court.

(The following transpired at the Bench.)

MR. CHISHOLM: Your Honor, I would move for a mistrial, for the reason that the witness said he received a photograph of Mr. Green from a police officer that had previously arrested him for a narcotics violation. The reason is that the answer was not responsive to the question. And it is certainly prejudicial, because in this case there is, you know, no prior criminal offense.

The question was how he subsequently identified Mr. Green. And it didn't call for any reference to any arrest for any other narcotics violation.

MR. NORRIS: Your Honor, I didn't anticipate that answer of the witness. However, I will oppose any motion for a mistrial.

If there is any prejudice, it can be cured by an instruction by the Court to the jury, to disregard what the witness has testified to. There is no evidence of that at all.

And the witness testified how he identified John Green, how he did it.

Transcript pp. 149-153

THE COURT: Well, the answer seemed to come out of the — It didn't seem like any premeditation on the part of the witness.

But I think the best thing to do is to instruct the jury. I realize it could be prejudicial; I'm cognizant of that. If it were willfully done, or intentionally, it would be grounds for a mistrial.

But, it creates one more problem in the trial of the case, that judges have to contend with.

As I recall the question—I don't have it before me, but it kind of led to a possible answer of that kind, of any identification from some mug shot, or something of that kind—The question was so broad that it invited a broad answer.

I think the best thing to do is to advise the jury that they should disregard the question and the reference to any previous arrest, because there is no evidence of it. It is prejudicial to the defendant, and it should be obliterated from their minds completely, as to the answer which he gave.

To that extent, that is the best I believe the Court can do. I don't think it is grounds to start the trial all over again, and have a new trial.

MR. CHISHOLM: Your Honor, may I say this—Without waiving my objection, I would suggest that if the Court intends to clarify the issue, there was a matter in which there was a marijuana violation, which was dismissed by the Court. And I suggest, so that there wouldn't be any prejudice to the defendant as a result of that answer, that that should be added to it.

THE COURT: Is that what it was?

MR. NORRIS: My best information is that it was a marijuana case, and it was continued without a finding, and under Massachusetts law he received a fine.

Transcript pp. 149-153

MR. CHISHOLM: No, it was Court costs.

MR. NORRIS: Court costs.

MR. CHISHOLM: Continued and dismissed.

THE COURT: All right, very well.

(The following transpired in open court.):

THE COURT: The jury will note that the last question of counsel brought forth an answer from the witness, that he observed a photograph received from a police officer, which photograph purportedly had been obtained from an arrest of this defendant on a narcotics charge.

In the first place, the answer was inappropriate, because it could be very prejudicial to this defendant.

Secondly, counsel advises me—and I have no reason to disbelieve his representation—It concerned a matter involving marijuana, which case was dismissed, and there was no conviction on it.

So the jury will completely disregard the last response of the witness and eliminate it from your consideration in this case. Eliminate any possible prejudice that might flow from it, that answer against this defendant, because it was a marijuana matter, and it shouldn't even have been mentioned. It was an ultimate dismissal. And the jury will completely disregard it in your consideration of this case.

Let's proceed.